BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

WALTER W. LONG	)	
Claimant	)	
v.	)	
	)	Docket Nos. 1,072,841
ICL PERFORMANCE PRODUCTS LP	)	& 1,075,380
Respondent	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE COMPANY	)	
A/K/A AIG CLAIMS	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent and AIG Claims (AIG) request review of the December 3, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth. Claimant appears by Judy A. Pope of Overland Park, Kansas. Respondent and AIG appear by Christopher J. McCurdy of Overland Park, Kansas. Jeff S. Bloskey, of Overland Park, Kansas, appears for respondent and Old Republic Insurance Company.[1]

ISSUES

While performing light duty due to a December 29, 2014, left knee injury (Docket No. 1,075,380), claimant alleged a right shoulder injury by repetitive trauma from April to May, 2015 (Docket No. 1,072,841).[2] The ALJ found claimant injured his shoulder by repetitive trauma, arising out of and in the course of his employment, and that such injury was a natural and probable consequence of his left knee injury. The ALJ awarded medical treatment against AIG, the carrier on the risk when the knee injury occurred.

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[1] Old Republic Insurance Company did not appear at the preliminary hearing and did not file a brief with the Board. The preliminary hearing Order indicated Mr. Bloskey entered his appearance for respondent and Old Republic in Docket No. 1,075,380 on December 1, 2015. Although it appears Mr. Bloskey received the preliminary hearing Order, the Division records indicate he did not receive a copy of the Application for Review or the Acknowledgment of Application for Review and Briefing Schedule issued by the Board.

[2] The parties agree that there is no issue before the Board regarding the left knee injury, Docket No. 1,075,380.

AIG contends the ALJ erred in finding claimant sustained personal injury by repetitive trauma to his right shoulder arising out of and in the course of his employment, and misapplied the natural and probable consequence rule. AIG also argues the evidence is contrary to the ALJ's decision because: (1) Dr. Elo questioned the relationship between claimant's light duty job and his shoulder injury; (2) Dr. Bieri found claimant sustained a new, distinct and separate injury to the shoulder; and (3) claimant's testimony that he injured his shoulder because he repetitively used his right arm lacks credibility. Respondent maintains that because the right shoulder injury resulted from a distinct and separate accident, and any compensation awarded should be paid by Old Republic, the carrier on the risk when the alleged shoulder injury occurred. AIG requests the Board reverse the ALJ's Order.

Claimant contends he sustained personal injury by repetitive trauma to his right shoulder that arose out of and in the course of his employment, and that his shoulder injury was a natural and probable consequence of his knee injury. Claimant requests the Board affirm the ALJ's decision.

The issues are:

1. Did claimant sustain personal injury by repetitive trauma to his right shoulder that arose out of and in the course of his employment?

2. If so, is claimant's shoulder injury a natural and probable consequence of his left knee injury?

FINDINGS OF FACT

Claimant testified he injured his left leg, knee, and foot on December 29, 2014, when he fell backwards off a ladder. Claimant underwent a left knee arthroscopy, performed by Stephan L. Pro, M.D., and anticipated undergoing a left ACL reconstruction by the same physician. Claimant testified Dr. Pro imposed light duty restrictions due to the knee injury.[3]

Claimant testified that on April 30, 2015, he was assigned a new light duty job that required placing labels on empty product bags, the dimensions of which were 18 inches wide by 30 inches long.[4] The job required claimant to sit at a table, reach in front to get a bag, and then peel and stick labels on the bag. Stacks of the bags and labels were located

[3] The restrictions of Dr. Pro in effect when claimant alleges his right shoulder injury were: no repetitive climbing, no kneeling or squatting, and "desk work." P.H. Trans., Cl. Ex. 2 at 1-2.

[4] P.H. Trans. at 41.

on the table, but the record is unclear precisely where the stacks were placed. Claimant testified he always performed the job with his right arm. When asked why he did not use his left arm, claimant responded, "[b]ecause I'm right handed."[5] Claimant testified that as he sat at the table, his injured left leg extended straight out in front of him. According to claimant, he did not twist his body, but had to reach over with his right arm to get everything, making it difficult.

In the room where claimant did the light duty work was a long table, on which were stacks of bags claimant picked up and transferred to his table, as needed. According to claimant, there were over 100 bags in each such stack.

Claimant testified he was not required to complete a specific number of bags during each shift. Although it varied from day to day, claimant estimated he applied labels from 800 to 1,500 times per eight hour shift. Claimant worked on the bags/labels job for three weeks, two to three days per week, commencing on April 30, 2015.

According to claimant, he began experiencing pain on top of his right shoulder during the first week he performed the bags/labels job. Claimant testified the pain worsened thereafter. He reported his shoulder pain to the safety director and requested treatment. Claimant asserted he told the safety director his right shoulder hurt as a result of the light duty work of placing the labels on bags. Claimant testified he had no previous problems, nor had he seen a physician, regarding his right shoulder.

Claimant attributed his shoulder pain to reaching for, peeling and sticking labels on bags with his right arm.

On May 21, 2015, respondent took claimant to Darin Elo, M.D., whom claimant said he saw on four occasions. Claimant asserted Dr. Elo confirmed he sustained a right shoulder injury. Claimant testified Dr. Elo did not ask about his light duty job, how his job was performed or what he did to injure his shoulder. Respondent authorized Dr. Elo to treat claimant's shoulder.

Claimant testified that even though Dr. Elo said he could perform light duty, respondent decided it could no longer accommodate claimant's restrictions, and he has not returned to work since May 21, 2015.

Claimant testified he continued having problems with his left leg and saw Peter V. Bieri, M.D. Dr. Bieri examined claimant's left leg and knee. According to claimant, Dr. Bieri also evaluated his right shoulder and asked him to demonstrate the light duty work he

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[5] *Id.* at 34.

Claimant testified Dr. Pro was willing to treat his shoulder. Claimant requested authorization for Dr. Pro to treat his right shoulder and left leg.

Shane Munsch, respondent's environmental health and safety compliance manager, oversaw regulatory matters, the safety program, environmental compliance programs, security programs and a variety of production-related matters. He was not claimant's direct supervisor.

Work related injuries at the plant were reported to Mr. Munsch's department. He testified he ensured all employees were properly cared for in the event of an injury or incident. Mr. Munsch referred injured employees to respondent's company doctor, and respondent tried to accommodate employees with medical restrictions.

Mr. Munsch testified claimant worked full-time, at full-duty, until he fell off the ladder and injured his left knee and leg. Mr. Munsch knew claimant returned to work with restrictions imposed by Dr. Pro and that respondent accommodated. Mr. Munsch provided the restrictions to claimant's supervisor, who assigned claimant work that complied with the restrictions.

Mr. Munsch testified claimant was assigned to place labels on bags, each of which weighed a few ounces. Claimant applied two stickers to each bag.

Mr. Munsch did not know if claimant ever reported a problem with his right shoulder before he performed the bags/labels job. According to Mr. Munsch, claimant reported his shoulder pain to him, and the safety coordinator drove claimant to Dr. Elo's office. After claimant saw Dr. Elo, respondent decided not to continue providing claimant with light duty work.

When claimant reported he injured his shoulder performing the light duty job, Mr. Munsch's department investigated his injury. As part of the investigation, one of respondent's workers took a photograph (or photographs) of claimant's work station as it appeared when claimant last worked. The bags claimant had completed were included in the photograph. As a result of respondent's investigation, it was concluded that on the day he was injured, he had labeled 80 bags. Claimant had worked around three hours when he reported his injury around 11:00 a.m. on May 21, 2015. Claimant's supervisors told Mr. Munsch that when employees were assigned to label bags, 600 to 800 labels were applied per day.

Mr. Munsch did not know the number of bags claimant labeled per day, nor did he know at what pace claimant applied the labels, or what claimant did "minute to minute" on light duty. Mr. Munsch did not recall any other bags in the room, other than those on claimant's work table. If there were other bags in the room, Mr. Munsch believed they would have been photographed as part of the investigation.

Darin Elo, M.D. evaluated claimant for right shoulder pain. Dr. Elo's May 21, 2015, chart entry indicated claimant reported experiencing shoulder pain he attributed to placing stickers on bags, which he had been doing for a few weeks. A Patient Registration form, apparently completed by claimant, indicated he was injured on May 21, 2015, at 11:00 a.m. Claimant described his injury as: "Consequential Injury from due to Light Duty work. Repatitions work pealing and sticking Labels on Product bags".[6]

Dr. Elo's May 21, 2015 chart entry further states:

> PLAN: The patient does report a moderate level of pain. I am not sure exactly how he sustained any injury by peeling off stickers and placing them on a bag. However, it seems unlikely that this would have caused any severe injuries to the shoulder. . . . I see virtually no possibility that with the mechanism given that he should have sustained any significant injury to his shoulder.[7]

Nurses notes, also dated May 21, 2015, indicate claimant "[h]as been peeling off stickers & placing them on bags x 2 wks - c/o [right] shoulder pain."[8] Dr. Elo again saw claimant on May 28, 2015. The doctor found the shoulder was unchanged. The doctor's chart entry states:

> PLAN: Although I continue to still have some doubts as to how the patient managed to injure himself by peeling stickers off and placing them on bags, since he has not had significant improvement in his symptoms this week we will start some physical therapy for him.[9]

Dr. Elo diagnosed shoulder pain, and made no reference to a rotator cuff tear.

Dr. Bieri evaluated claimant at the request of his counsel on September 21, 2015. The doctor's report stated that during the course of treatment for his left leg injury, claimant was placed on accommodated duty by his employer from April 30, 2015, to May 20, 2015. The job required repetitive use of the right upper extremity, resulting in right shoulder pain.

Dr. Bieri concluded claimant had no diagnostic or treatment interventions to the right shoulder, but had clinical evidence of a rotator cuff tear. The doctor based his diagnosis of a rotator cuff tear on his finding of nonuniform active range of motion in the right shoulder. Dr. Bieri recommended a formal orthopedic consultation. Dr. Bieri opined the

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[6] P.H. Trans., Cl. Ex. 3 at 9.

[7] *Id.* at 4.

[8] *Id.* at 6.

[9] *Id.* at 1.

repetitive light duty work claimant performed from April 30, 2015, to May 20, 2015, was the prevailing factor causing the right shoulder injury.

Dr. Pro, in response to questions from AIG, responded in a report dated October 28, 2015, that claimant did not report right shoulder pain during any of his clinical visits.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(e) states:

> "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

K.S.A. 2014 Supp. 44-508(f) provides in relevant part:

> (1) "Personal injury'' and "injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
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> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
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> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2014 Supp. 44-508(g) states:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2014 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

In *Logsdon*,[10] the Kansas Court of Appeals held:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
> . . .

"When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."[11]

The undersigned Board Member disagrees with the ALJ that claimant sustained a right shoulder injury by repetitive trauma that arose out of and in the course of his employment. The ALJ's preliminary hearing Order is accordingly reversed.

The left leg restrictions of Dr. Pro were complied with by respondent. There is no contention that the light duty claimant performed in any way violated those restrictions. The light duty work respondent provided required no use of the left leg, which was extended in front of claimant while he did the work in a seated position. It is difficult to

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[10] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶ 1 & 2, 128 P.3d 430 (2006)

[11] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

imagine a light duty job more benign, and less likely to cause a right shoulder injury, let alone a tear of claimant's rotator cuff, than the bags/labels position. The job required negligible lifting. The bags weighed a matter of ounces and the labels likely weighed even less. Claimant was not required to perform anything in the nature of forceful use of his upper extremities, and there is no indication in the record he was required to label a specific number of bags per shift or per week.

Moreover, claimant only performed the bags/labels job on a part-time basis, two to three days per week. Claimant performed the light duty job for a relatively short period of time, from April 30, 2015, to May 21, 2015. Yet, claimant testified he developed right shoulder pain during the first week he did the light duty position.

It seems improbable claimant injured his right shoulder performing the bags/labels job, given the nature of the duties required and the amount of time claimant performed the job before his pain began.

The medical evidence casts further doubt on claimant's allegations of repetitive trauma. Dr. Bieri diagnosed a right rotator cuff tear, but both Dr. Pro and Dr. Elo refer only to shoulder pain, without any mention of a torn rotator cuff, or any other lesion or change in the physical structure of claimant's body. It is unclear why Dr. Bieri found clinical evidence of a rotator cuff tear from claimant's nonuniform range of motion. No diagnostic tests are in the record establishing claimant tore his rotator cuff. Although claimant testified Dr. Pro would be willing to treat his shoulder, Dr. Pro's report indicates claimant made no complaints of shoulder symptoms during any of the doctor's office visits with claimant.

Dr. Elo had the opportunity to see claimant and his shoulder on more than one occasion, unlike Dr. Bieri. The records of Dr. Elo, discussed in detail above, clearly indicate he saw little, if any, causal relationship between claimant's job applying stickers to bags and his shoulder pain. It appears Dr. Elo and Dr. Bieri were provided with essentially the same history and claimant had an equal opportunity to describe to both physicians how he claimed to have injured his shoulder. Although all of the evidence was considered, the undersigned is persuaded by the causation opinion of Dr. Elo rather than that of Dr. Bieri.

This Board Member finds claimant did not sustain his burden of proof that he sustained a right shoulder injury by repetitive trauma arising out of and in the course of his employment. Given that finding, it is unnecessary to address whether claimant's alleged shoulder injury was a natural and probable consequence of the left leg injury.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, the undersigned Board Member finds that the Order of Administrative Law Judge Steven M. Roth dated December 3, 2015, is reversed.

IT IS SO ORDERED.

Dated this _____ day of March, 2016.

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HONORABLE GARY R. TERRILL
BOARD MEMBER

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Honorable Steven M. Roth, Administrative Law Judge

[12] K.S.A. 44-534a.